

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

| | | |
|--|---|---------------------|
| NAYLOR SENIOR CITIZENS HOUSING, LP; |) | |
| |) | |
| NAYLOR SENIOR CITIZENS HOUSING II, LP; |) | |
| |) | |
| Plaintiffs-Appellants, |) | Appeal No.: SD32098 |
| |) | |
| vs. |) | |
| |) | |
| SIDES CONSTRUCTION COMPANY, INC., |) | |
| |) | |
| SCHULTZ ENGINEERING SERVICES, INC., |) | |
| and |) | |
| DILLIE AND TRAXEL, LLC., |) | |
| |) | |
| Defendants-Respondents. |) | |

Appeal from the Circuit Court of Ripley County
The Honorable Michael Ligons, Circuit Judge

BRIEF OF RESPONDENT SIDES CONSTRUCTION COMPANY, INC.

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INC.**

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JURISDICTIONAL STATEMENT

Respondent concurs with appellants' jurisdictional statement.

STATEMENT OF FACTS

On September 22, 2006, property owned by Appellants, Naylor Senior Citizens Housing, LP and Naylor Senior Citizens Housing II, LP experienced flooding and allegedly sustained damages. The general partner of both Limited Partnerships is John Dilks. On September 21, 2011, a petition was filed in Ripley County Circuit Court on behalf of the Limited Partnerships and John Dilks individually. The petition was signed by “John Dilks, Managing Partner of Naylor Senior Citizens Housing, LP, Managing Partner of Naylor Senior Citizens Housing II, LP”. (L.F. pgs 7 – 11).

All defendants were served, obtained counsel, and filed motions to dismiss the claims of the limited partnerships. All of the defendants based their motions on the fact that under Missouri law, partnerships must be represented by counsel in court, that John Dilks is not an attorney, and that the petition, as far as the limited partnerships went, was a nullity. Further, because the statute of limitations had by that time expired, the fact that no valid pleading had been filed meant the partnerships’ claims should be dismissed.

John Dilks filed an affidavit in response claiming that he had received advice from a lawyer who had discovered he had a conflict of interest just before the statute of limitations ran. The lawyer told him to file his petition himself. (L.F. pgs 56 – 58).

The Court heard argument on the respondents’ motions to dismiss and appellant’s motion to file an amended petition on January 20, 2012. On March 7, 2012, the Court mailed its order (dated February 28) to counsel. (L.F. pg 70). The Court’s order sustained the motions to dismiss against the partnerships. On March 26, 2012, John Dilks filed an amended petition in his name only against all entities. (L.F. pg 77 – 79).

On May 2, 2012, at appellant's request, the court issued an order making its ruling final for purposes of appeal. (L.F. pg 98). This appeal followed.

POINT RELIED ON

**1 The trial court was correct in sustaining respondent's motion to dismiss
as to Appellants, two partnerships, because Missouri law is clear that
partnerships must be represented in Court by an attorney thus making
appellants' petition a nullity, and the statute of limitations had expired
prior to the hearing of respondent's motion in the trial court.**

- 1 MO Rule of Civil Procedure 55.03(a)
- 2 R.S.MO 359.081
- 3 R.S.MO 484.020.2
- 4 *Joseph Sansone Co. v. Bay View Golf Course*, 97 S.W.3d 531 (Mo.App. 2003)
- 5 *Hensel v. American Air Network*, 189 S.W.3d 582 (Mo. 2006)
- 6 *6226 Northwood Condominium Association v. Dwyer*, 330 S.W.3d 504 (Mo.App.
2010)
- 7 *Schenberg v. Bizmart, Inc.*, 178 S.W.3d 435 (Mo.App. 2005)

ARGUMENT

The trial court was correct in sustaining respondent’s motion to dismiss as to Appellants, two partnerships, because Missouri law is clear that partnerships must be represented in Court by an attorney thus making appellants’ petition a nullity, and the statute of limitations had expired prior to the hearing of respondent’s motion in the trial court.

Although appellants have indicated two Points Relied On in their brief, they are inter-related, and respondent will deal with them together.

This matter is governed by:

1 MO Rule of Civil Procedure 55.03(a) which states:

“a. **Signature required.** Every pleading, motion and other filing shall be signed by at least one attorney of record in the attorney’s individual name...”

2 R.S.MO 359.081 which states:

“A limited partnership shall, in the partnership name, sue and be sued, complain and defend in any court of law or equity.”

3 R.S.MO 484.020.2 (Who shall engage in the practice of law or do law business – penalty) which states:

“Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor”.

Taken together, it is clear that Missouri black letter law requires that limited partnerships be represented in a court of law by an attorney. A petition filed on behalf of a partnership by a non-lawyer is a nullity. *Joseph Sansone Co. v. Bay View Golf Course*, 97 S.W.3d 531 (Mo.App. 2003). The Missouri Supreme Court recently affirmed this view in *Hensel v. American Air Network*, 189 S.W.3d 582 (Mo. 2006). Although the case was not about a corporation, the Supreme Court stated in a footnote that “it is axiomatic that a corporation must act through an attorney in all legal matters”. *Hensel*, 189 S.W.3d at 584.

Appellants argue, however, that recent case law shows that courts have interpreted this rule leniently, allowing litigants to correct the improper filings. Of note, however, each and every case cited by appellants concerns the rights of *individuals* who made a mistake in the filing of their petitions. In *Haggard v. Division of Employment Security*, 238 S.W.3d 151 (Mo. banc 2007), and in *Carter v. State of Missouri*, 181 S.W.3d 78 (Mo. banc 2006), the Supreme Court allowed individual prisoners to file their post-conviction motions even though they originally forgot to sign them. Appellants also cite *Hensel v. American Air Network*, 189 S.W.3d 582 (Mo. 2006) where the plaintiff’s civil suit was filed by an out of state attorney who had not yet been admitted *pro hac vice*. The Supreme Court allowed the individual claim to go forward, but as noted above, specifically stated that the rule is different for corporations. And in *In re Estate of Conrad*, 272 S.W.3d 313 (Mo.App. 2008), claimants to an estate were allowed to sign amended claims, where they had originally neglected to sign.

The difference in all of these cases from the present case is that each plaintiff allowed to correct a signature problem had the right to file his or her claim *pro se*, without an attorney. None of these cases involve corporations or partnerships. No Court in Missouri has allowed a corporation or partnership to file a lawsuit without an attorney. That is because such a filing is prohibited by Missouri law.

Appellants' assertion that they filed their petition based on the advice of an attorney does not change this case. Well meaning attorneys sometimes give bad advice. As the Supreme Court stated in *Hensel*, "it is axiomatic that a corporation must act through an attorney in all legal matters". *Hensel, supra*. Appellant cites to *Haggard v. Division of Employment Security*, 238 S.W.3d 151 (Mo. banc 2007) to attempt to negate the language of *Hensel*. *Haggard* was an appeal by a business owner from a Labor and Industrial Relations Commission decision regarding the status of employees. At the hearing, the Division of Employment Security (DES) was represented by a non-lawyer. Haggard argued on appeal that because of that fact, the judgment should be invalid. The Supreme Court found that although the DES was required to have counsel represent it at hearing, the plaintiff had failed to object and therefore waived the issue. The court also found that the fact that DES was not represented at hearing did not render the judgment void as it was not a jurisdictional issue.

The issues in *Haggard* are substantially different than in the present case. Initially, there is no doubt here that none of the respondents waived the issue of a non-lawyer purporting to file suit on behalf of limited partnerships. Secondly, respondents do not argue that the trial court was deprived of jurisdiction. The

fundamental argument in this case is that because the filing by John Dilks was a nullity under the law, and further that the statute of limitations on the claims ran the following day, there is no longer a cause of action against the defendants by the partnership appellants.

The most recent case on this issue appears to be *6226 Northwood Condominium Association v. Dwyer*, 330 S.W.3d 504 (Mo.App. 2010). In that case in the Eastern District, a condominium association brought a small claims action for unpaid assessments. After a victory by the condo association in small claims court, the individual defendant filed a motion for trial de novo in circuit court. The trial court, during the trial de novo, expressed its opinion, after objection by the defendant, that the association was properly represented by its treasurer, a non-lawyer. The Eastern District reversed. The Court stated that when a representative of a corporation engages in the unauthorized practice of law, the proper remedy is to dismiss the cause or treat the actions taken by the representative as a nullity, citing to *Schenberg v. Bizmart, Inc.*, 178 S.W.3d 435 (Mo.App. 2005). *6226 Northwood*, 330 S.W.3d at 506. *Schenberg* held that a corporation's failure to be represented by counsel when filing a motion for new trial rendered that filing void, and did not extend the time for filing a notice of appeal. Notably, the Missouri Supreme Court refused transfer of that case. *6226 Northwood* is directly on point, in that, as here, the filings of the partnerships which were not represented by counsel were void, and did not extend the statute of limitations.

In short, appellants' claim that the law has changed regarding the signature requirement for all plaintiffs is incorrect. Instead, what we see is one line of cases

loosening the signature requirement for individual plaintiffs who have a right to bring a claim without an attorney, and another line of cases with strict adherence to the prohibition of corporations or partnerships from practicing law. Appellants fall into that latter class of plaintiffs, and filings on their behalves filed by a non-attorney are considered a nullity under the law.

CONCLUSION

The petition filed by John Dilks on September 22, 2011 on behalf of himself and Naylor Senior Citizens Housing, LP and Naylor Senior Citizens Housing II, LP was a nullity with regard to the two partnerships because they were not represented by an attorney. Although that fact alone did not deprive the trial court of jurisdiction over the case, after the statute of limitations expired on September 23, 2011, there was no longer a cognizable claim on behalf of the partnerships. The filing of a petition which was a nullity did not toll the statute of limitations. The trial court's order dismissing the claims of the partnerships should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, I electronically filed the foregoing with the Clerk of the Court using the electronic filing system/EFS which sent notification of such filing to all attorneys of record.

/s/ Pamela M. Triplett

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify that Respondent's brief filed herewith (1) includes the information required by Rule 55.03, (2) complies with the limitations contained in Rule 84.06(b), and (3) contains 2041 words.

/s/ Pamela M. Triplett